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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

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No. 74-5054

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR, CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTLEY, ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY AND JOHN HURLEY, and on behalf of all other persons similarly situated,

Petitioners,

-against-

ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, JAMES M. SHUART, individually and in his capacity as Commissioner of the Nassau County Department of Social Services, BARRY VANLARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, and LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	3
Question Presented	4
Regulations Involved	4
ARGUMENT - THE PRO-RATION OF SHELTER COST AMONG ALL PERSONS LIVING IN A COMMON HOUSEHOLD AND THE EXCLUSION OF THE NON-PAYING LODGER'S SHARE OF THAT COST FROM SHELTER ALLOWANCE PAYMENTS PURSUANT TO 18 NYCRR § 352.30(d) PROPERLY DISTINGUISHES THE SHELTER NEEDS OF RECIPIENTS FROM THOSE OF NON-RECIPIENT LODGERS. SECTION 352.30(d) IS THEREFORE ENTIRELY CONSISTENT WITH THE FEDERAL STATUTES AND REGULATIONS REQUIRING THAT PUBLIC ASSISTANCE BE PROVIDED TO AFDC RECIPIENTS AND ONLY TO THEM	5
Conclusion	9

TABLE OF CASES

	Page
Boucher v. Minter, 349 F. Supp. 1240 (D. Mass. 1972)	8
Cuffee v. Department of Public Welfare 291 A. 2d 549 (Pa. Supt. Ct. 1972)	8
Dullea v. Ott, 316 F. Supp. 1273 (D. Mass. 1970)	8
Gaither v. Sterret, 346 F. Supp. 1095 (N.D. Ind.), affd. 409 U.S. 1970 (1972)	9
Gilliard v. Craig, 331 F. Supp. 587 (W.D.N.C. 1971), affd. 409 U.S. 807 (1972), rehg. den. 409 U.S. 1119 (1972)	8
Hausman v. Department of Institutions and Agencies, 314 A. 2d 362, cert. den. ___ U.S. ___, 42 U.S.L.W. 3679 (June 10, 1974)	9
Jenkins v. George, 312 F. Supp. 298 (W.D. Pa. 1969)	9
King v. Smith, 392 U.S. 309 (1968)	7, 9
Lewis v. Martin, 397 U.S. 552 (1970)	7, 9
Mothers and Childrens Rights Organization v. Stanton, 371 F. Supp. 298 (N.D. Ind. 1973)	9
Owens v. Parham, 350 F. Supp. 598 (N.D. Ga. 1972)	9
Reyna v. Vowell, 470 F. 2d 494 (5th Cir. 1972)	8
Roselli v. Affleck, 373 F. Supp. 36 (D.R.I. 1973)	9
Rosen v. Hursh, 464 F. 2d 731 (8th Cir. 1972)	9
Soloman v. Shapiro, 300 F. Supp. 403 (D. Conn.) affd. 396 U.S. 5 (1969)	9
Watson v. Department of Public Welfare, 293 A. 2d 133 (Pa. Supt. Ct. 1972)	8
X v. McCorkle, 333 F. Supp. 1109 (D.N.J. 1970), affd. per curiam sub nom Engelman v. Amos, 404 U.S. 23 (1971)	9

STATUTES AND REGULATIONS

Federal Statutes

	Page
28 U.S.C. § 1251	3
§ 1343	3
42 U.S.C. § 601	6
602	6
606	6
§ 1983	3

FEDERAL REGULATIONS

---

45 C.F.R. § 233.90(a)	7

STATE REGULATIONS

---

18 NYCRR § 352.30(d)	1, 4, 5, 7
§ 352.31(a)(3)(iv)	2, 4, 5
§ 352.7(f)	6

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TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR RESPONDENTS IN OPPOSITION

The Commissioner of the New York State Department of Social Services and the former Acting Commissioner (hereinafter "respondents") oppose the Petition for a Writ of Certiorari to review the decision of the Court of Appeals for the Second Circuit (Oakes, C.J., dissenting), dated May 14, 1974, in the above consolidated actions. That decision found 18 NYCRR §§ 352.30(d)

and 352.31(a)(3)(iv) consistent with the Social Security Act, 42 U.S.C. § 601, et seq. and related federal regulations insofar as the State regulations authorize the pro-ration of shelter allowances payable to public assistance recipients upon a factual finding that a non-paying ("non-contributing") lodger is sharing living quarters with a recipient. The constitutional claims raised by the petitioners in their complaints were remanded to a three-judge district court for disposition. Taylor v. Lavine, ___F. 2d___, Doc. Nos. 669 and 701, Slip. op., p. 3470.

A Jurisdictional Statement is being filed in this Court in VanLare v. Hurley, requesting that plenary consideration be afforded to the appeal by the State public officials, respondents herein, from a Judgment and Order of a three-judge district court (Hays, C.J., dissenting) entered on August 15, 1974, on remand from the Second Circuit, declaring the aforesaid State regulations unconstitutional under the Fourteenth Amendment and enjoining their enforcement.

Respondents respectfully request that this Brief in Opposition be considered with the Jurisdictional Statement in VanLare v. Hurley.

Opinions Below

The majority and dissenting opinions of the United States Court of Appeals for the Second Circuit, dated May 14, 1974, are unreported and are reproduced in the Appendix to the Petition for Certiorari at A. 3. The opinions are also reproduced in Appendix "B" to the Jurisdictional Statement in VanLare v. Hurley.

The opinion of the United States District Court for the Southern District of New York in Hurley v. VanLare (Bauman, D.J., dated October 3, 1974) from which appeal was taken to the Second Circuit, is reported at 365 F. Supp. 186 and is reproduced in the Appendix to the Petition for Certiorari at A. 31. It is also reproduced in Appendix "C" to the Jurisdictional Statement in VanLare v. Hurley.

The Memorandum and Order of the United States District Court of the Eastern District of New York in Taylor v. Lavine (Weinstein, D.J.) dated October 10, 1973, from which appeal was taken to the Second Circuit is unreported and is reproduced in the Appendix to the Petition for Certiorari at A. 56. It is also reproduced in Appendix "D" to the Jurisdictional Statement in VanLare v. Hurley.

The majority and dissenting opinions of the three-judge district court in VanLare v. Hurley, on remand from the Second Circuit, dated August 5, 1974, are unreported and are reproduced in Appendix "A" to the Supplement to the Petition for a Writ of Certiorari, filed in this Court on or about August 25, 1974. They are also reproduced in Appendix "A" to the Jurisdictional Statement in VanLare v. Hurley.

Jurisdiction

The petitioners rely on 28 U.S.C. § 1254(1) in support of the jurisdiction of this Court.

The Second Circuit's decision is dated May 14, 1974. A petition for rehearing contaning the suggestion that the appeal be heard en banc was denied on June 18, 1974. The Petition for Certiorari was filed in this Court on or about August 2, 1974.

The jurisdiction of the district courts was conferred by 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) and (4).

Question Presented

Whether the pro-ration of shelter cost among all persons living in a household and the exclusion of the non-paying lodger's share of that cost from public assistance shelter allowance payments pursuant to 18 NYCRR § 352.30(d) are consistent with federal statutes and regulations governing Aid to Families with Dependent Children.

Regulations Involved

18 NYCRR § 352.30 states in part:

"352.30. Persons included in the budget

* * *

(d) A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15 shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular allowance".

18 NYCRR § 352.31 formerly stated in part:

"352.31. Estimate of need and application of income

(a) For applicant or recipient.

* * *

(3) When a female applicant or recipient is living with a man to whom she is not married, other than on an occasional or transient basis, his available income and resources shall be applied in accordance with the following:

* * *

(iv) When the man is unwilling to assume responsibility for the woman or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(d)[*]".

Additional related statutes and regulations in Appendix "G" of the Jurisdictional Statement in VanLare v. Hurley.

Statement of the Case

The Statement of the Case in the Jurisdictional Statement in VanLare v. Hurley, at pp. 6-27 is adopted and incorporated by reference.

ARGUMENT

THE PRO-RATION OF SHELTER COST AMONG ALL PERSONS LIVING IN A COMMON HOUSEHOLD AND THE EXCLUSION OF THE NON-PAYING LODGER'S SHARE OF THAT COST FROM SHELTER ALLOWANCE PAYMENTS PURSUANT TO 18 NYCRR § 352.30(d) PROPERLY DISTINGUISHES THE SHELTER NEEDS OF RECIPIENTS FROM THOSE OF NON-RECIPIENT LODGERS. SECTION 352.30(d) IS THEREFORE ENTIRELY CONSISTENT WITH THE FEDERAL STATUTES AND REGULATIONS REQUIRING THAT PUBLIC ASSISTANCE BE PROVIDED TO AFDC RECIPIENTS AND ONLY TO THEM.

The Second Circuit majority correctly held that "[p]rorating housing costs [pursuant to § 352.30(d)] between the recipient and non-recipient simply reflects the separability of the need of the AFDC eligible family members from the needs

[*] Effective July 26, 1974, § 352.31(a)(3)(iv) was amended to provide:

"(3) When an applicant or recipient is living other than on an occasional or transient basis, with a person to whom such applicant or recipient is not married, the available income and resources of such person shall be applied in accordance with the following:

* * *

(iv) When the person is unwilling to assume responsibility for the applicant or recipient or his or her children and there are no children for whom such person is legally responsible, such person shall be treated as a lodger in accordance with subdivision (d) of section 352.30 of this Part".

of persons who have not demonstrated their eligibility for public assistance". App. "B", p. 36a*

Both the majority's reasoning and its support of § 352.30(d) are entirely consistent with federal statutes and regulations governing the AFDC program as well as with the decisions of this Court. Thus, federal statutes require that aid be furnished to meet the needs of "all eligible individuals" who are, under the provisions of the AFDC program applicable herein, the dependent child and caretaker relative, not the relative, child and non-eligible lodger. 42 U.S.C. §§ 601, 602(a)(10), 606(a) (App. "G", pp. 87a-89c). As Circuit Judge Mays observed for the majority, in describing those for whom aid must be provided, the statutes necessarily allow that aid may be denied to those omitted. App. "B", p. 38a.**

* References are to the Appendices to the Jurisdictional Statement in VanLare v. Hurley.

** Federal AFDC legislation authorizes the states to provide public assistance to certain persons other than dependent children and caretaker relatives who are considered essential to welfare of the recipients. 42 U.S.C. §§ 602(a)(7), 606(b)(App. "G" pp. 87a-88a, 88a-89a). New York has opted to participate in this extension of the AFDC program. Social Services Law § 350; 18 NYCRR § 352.7(f). No claim was made below that any of the "lodgers" were essential persons within the meaning of the federal and state legislation. Moreover, an essential person must establish separate eligibility for public assistance on the basis of his own income and resources. 18 NYCRR § 352.7(f).

King v. Smith, 392 U.S. 309 (1968) and Lewis v. Martin, 397 U.S. 552 (1970) invalidated state statutes and regulations which assumed, either on the basis of an artificial legal obligation of support imposed on the "substitute parent" or "step-parent" of a eligible child or on the basis of mere presence in the household, that the "man-in-the-house" would support the AFDC family. 45 C.F.R. § 233.90(a)(App. "G" pp. 89a-90a) is by its terms and intent, directed to the same purpose. Section 352.30(d) does not require or assume that the non-paying lodger is supporting the AFDC family. It merely separates the shelter needs of the family from the shelter needs of the lodger so that the public support provided meets only the family's needs and not those of the lodger who has not demonstrated his eligibility for public assistance.*

The reading afforded King v. Smith, supra and Lewis v. Martin by petitioners and the Second Circuit dissent (App. "B" pp. 39a-52a) would require the AFDC family to support the lodger to the extent of providing him with free shelter, a result clearly at odds with the expressed purpose of those actions, at odds with federal statutory requirements and one which respondents submit this Court did not intend.

* It is apparent that when § 352.30(d) uses the term "contribute" with reference to the lodger's payment of a pro-rata share of shelter cost, it is referring to the fractional share of shelter cost necessary to meet the lodger's own needs and not a gift or "contribution" to the family's needs. In order to be as clear as possible, respondents use the term "paying" rather than "contributing" when referring to the lodger's own share of shelter cost.

Even if Judge Oakes was correct in finding that the majority opinion "stands. . .alone" (App. "D" p. 39a) it would not for that reason be wrong. However, Judge Oakes is not correct. This Court's recent summary affirmance Gilliard v. Craig, 331 F. Supp. 587 (W.D.N.C. 1971), affd. 409 U.S. 807 (1972), rehg. den. 409 U.S. 1119 (1972), fully supports the Second Circuit majority. Therein, one of seven children in a household formerly consisting entirely of AFDC recipients was determined to be ineligible. The district court disapproved the State procedure which reduced the family's grant by the amount of the child's income but allowed the separation and discontinuance of the child's pro-rata share of the grant (including shelter cost) notwithstanding that the child continued to reside in the household.

As illustrated by the Gilliard decision, the choice is not between deeming the non-eligible's income and resources available to the public assistance family or allowing the non-eligible to obtain the benefits of public assistance, as argued by petitioners, but rather in recognizing the non-eligible's share of combined cost as separable, herein his cost of shelter, and denying reimbursement from public funds to the extent of that share only. Accord, Reyna v. Vowell, 470 F. 2d 494 (5th Cir. 1972); Boucher v. Minter, 349 F. Supp. 2140 (D. Mass. 1972)*; Dullea v. Ott, 316 F. Supp. 1273 (D. Mass. 1970); Watson v. Department of Public Welfare, 293 A. 2d 133 (Pa. 1972); Cuffee v. Department of Public Welfare, 291 A. 2d 549 (Pa. 1972).

* The continued citation of Boucher v. Minter, supra, in support of petitioners is startling. Therein the district court properly invalidated a budgetary reclassification which excluded the needs of the stepchildren upon the mother's (and caretaker relative's) remarriage on the ground that the stepfather had no legal duty of support to the children. However, the court went on to find that had the reclassification been made to the "shared responsibility" (for rent, etc.) category wherein the non-recipient stepfather's share was excluded but not the children's, the classification would have been sustained. It is the shared responsibility classification that is in issue on this Petition, not the stepparent classification.

The summary affirmances in Gaither v. Sterrett, 346 F. Supp. 1095 (N.D. Ind.), affd. 409 U.S. 1070 (1972); X v. McCorkle, 333 F. Supp. 1109 (D. N.J. 1970), affd. per curiam sub nom Engelman v. Amos, 404 U.S. 23 (1971) and Soloman v. Shapiro, 300 F. Supp. 403 (D. Conn.), affd. 396 U.S. 5 (1969) do not support the petitioners. Each of the case follows this Court's decision in Lewis v. Martin, supra and finds that the presence of a non-eligible stepparent in the household cannot be used as a basis for excluding the needs of dependent children from public assistance in the absence of a state law prescribing a legally enforceable obligation of support on behalf of all children. None of the cases holds that the stepfather must be included in the public assistance budget, or conversely, that he may be excused from providing his share of shelter cost, the issue raised with respect to the non-paying lodger herein. Accord, Rosen v. Hursh, 464 F. 2d 731 (8th Cir. 1972); Jenkins v. George, 312 F. Supp. 298 (W.D. Pa. 1969). Indeed, the only cases which appear to favor petitioners' position are Hausman v. Department of Institutions and Agencies, 314 A. 2d 362, cert. den. _____U.S._____, 42 U.S.L.W. 3679 (June 10, 1974)*; Roselli v. Affleck, 373 F. Supp. 36 (D.R.I. 1973); Mothers and Childrens Rights Organization v. Stanton, 371 F. Supp. 298 (N.D. Ind. 1973) and Owens v. Parham, 350 F. Supp. 598 (N.D. Ga. 1972). The difference in views results

* The result in Hausman is not inconsistent with respondents' position herein. It appears from the state court opinion that the court was dealing with a "flat grant" system which included shelter and food, clothing and incidentals. Thus, although a non-recipient's living in the household did establish the fact that he was sharing shelter with the AFDC family, it did not establish the fact that he was sharing food, clothing and incidentals as well. Accordingly, the state's reduction of "flat grant" by the non-recipient's share did "presume" facts which were not established on the record.

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74-453

from the courts' failure to recognize that each person living in a household has individual needs which can be separated from each other and that the AFDC program only requires that the needs of the eligible AFDC family be met with public funds.

The Court is respectfully referred to the Argument in the Jurisdictional Statement in VanLare v. Hurley for a more complete discussion of the issues presented in these actions.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
October 18, 1974

Respectfully submitted,

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